

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUBEN PABLO and BONNIE COURSEY,

No. C 08-03894 SI

Plaintiffs,

Related Case No. C 10-00628 SI

v.

**ORDER RE: DISCOVERY**  
**[Docket No. 73]**

SERVICEMASTER GLOBAL HOLDINGS,  
INC., et al.,

Defendants.

On August 9, 2010, plaintiffs filed a letter brief with the Court to compel production of certain documents and requesting a continuance of the filing dates for plaintiffs' renewed motion to certify a class and plaintiffs' opposition to defendants' motion for partial summary judgment.<sup>1</sup> Plaintiffs identify several categories of documents as to which it asserts that defendants' production was deficient. The Court hereby rules as follows.

**BACKGROUND**

The subject of this litigation is an employment dispute over unpaid wages brought by former and current employees against defendants ServiceMaster Global Holdings, Inc., the ServiceMaster Company, the Terminix International Company, L.P., and Terminix International, Inc. (collectively "Terminix"). On May 30, 2008, plaintiff Ruben Pablo filed a putative class action complaint in Marin

<sup>1</sup> On August 9, 2010, plaintiffs e-filed their letter brief without any of the supporting exhibits. Doc. 73. On August 13, plaintiffs e-filed an errata to the letter brief along with exhibits 8 and 9. Doc. 74. On November 17, plaintiffs e-filed the letter brief along with exhibits 1–7, doc. 94, and re-e-filed the errata, doc. 93.

1 County Superior Court against defendants. Defendants removed the action to federal court on August  
2 14, 2008, invoking this Court's diversity jurisdiction. The complaint was amended once in order to add  
3 named plaintiff Bonnie Coursey, such that the operative complaint in case number C 08-03894 SI ("the  
4 putative class action") is now the Amended Complaint, which was filed on August 12, 2009.

5 Plaintiffs in the putative class action have brought suit on behalf of all individuals employed by  
6 Terminix as inspectors in California from May 30, 2004 to the present. Am. Compl. ¶ 16. The  
7 gravamen of the complaint is that defendants avoided paying inspectors overtime compensation by  
8 improperly classifying them as exempt employees, failing to provide rest breaks, and failing to  
9 reimburse necessary work-related expenses.

10 California law exempts "outside salespersons" from overtime requirements. Cal. Code Regs.  
11 tit. 8 § 11010(1)(C). An outside salesperson is an employee who "customarily and regularly works more  
12 than half the working time away from the employer's place of business selling tangible or intangible  
13 items or obtaining orders or contracts for products, services or use of facilities." Cal. Code Regs, tit.  
14 8, § 11010(2)(J). Courts must evaluate whether an employee is properly classified as a salesperson by  
15 "inquiring into the realistic requirements of the job." *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th  
16 785, 802 (1999). "[T]he court should consider, first and foremost, how the employee actually spends  
17 his or her time." *Id.* The declarations submitted by both parties reflected substantial variation in how  
18 inspectors spend their time.

19 On August 17, 2009, the Court denied plaintiffs' motion for class certification. Doc. 49. The  
20 Court found that resolution of this claim on a class basis was not appropriate because plaintiffs could  
21 not satisfy the commonality requirement of Federal Rule of Civil Procedure 23(b)(3). With regard to  
22 the overtime claim, the Court explained that Terminix's uniform policies for classifying inspectors,  
23 determining compensation, and other employment practices did not predominate over the hundreds of  
24 individualized inquiries the Court would have to perform to determine whether inspectors spend more  
25 than half their workdays doing sales outside the office. Because the rest and meal break claim and the  
26 record keeping claims depended on the overtime claim, the Court denied certification on those issues  
27  
28

1 as well.<sup>2</sup>

2 The Court's Order signaled that if plaintiffs could demonstrate that the purported class members  
3 "spent more than half their work days on" inspections and report writing, then "the question of whether  
4 [these] activities constitute sales . . . would be . . . susceptible of class treatment." At a March 2010 case  
5 management conference, the Court set a deadline (which has since been continued several times) for  
6 plaintiff to file a renewed motion for class certification. Doc. 68.

7 On February 12, 2010, twenty-three individuals who would have been class members in the  
8 purported class action filed suit independently (case number 10-00628 SI, "the multi-plaintiff case"),  
9 setting forth claims similar or identical to the claims in that case. *See* Compl.

10 The discovery dispute currently before the Court relates to plaintiff's ongoing efforts to certify  
11 a class in the putative class action, as well as plaintiff's efforts to conduct discovery in the related multi-  
12 plaintiff case.

## 13 14 DISCUSSION

### 15 I. Retaliation claims documents

16 The first category of documents that plaintiffs wish to have produced are documents relevant to  
17 allegations of retaliation. Plaintiffs sets out details of alleged retaliatory actions taken against James  
18 McWilliams, named plaintiff in the multi-plaintiff case and prospective class member in the putative  
19 class action. Plaintiffs have requested production of investigation reports, as well as any videos,  
20 photographs and any and all documents pertaining to the incident and plaintiff McWilliams. Letter Br.  
21 Ex. 3 at 7–9. Defendants object to the request, arguing that the information is irrelevant to the claims  
22 currently before the Court. Although plaintiffs in the multi-plaintiff case have told the Court that they  
23 will be filing an amended complaint alleging retaliation, they have not yet done so.<sup>3</sup> Plaintiffs argue that  
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25 <sup>2</sup> The Court denied certification on the reimbursement claim without prejudice because  
26 it was not clear whether plaintiffs would wish to pursue the claim on a class basis in light of the  
remainder of the Court's order.

27 <sup>3</sup> Plaintiff in the multi-plaintiff case submitted a copy of a possible first amended complaint  
28 along with its letter brief, Letter Br. Ex. 5, and they filed an amended complaint on October 1, but the  
amended complaint was withdrawn as filed in error. Doc. 19. The original complaint is still the

1 the documents are relevant to the claims already before the Court. Plaintiffs state that they bear directly  
2 on the forthcoming renewed motion for class certification, because “[o]ne purpose of a class action for  
3 labor law violations is to protect employees from potential retaliation by their employer.”

4 Plaintiffs cite *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), for support. In *Gentry*, the  
5 California Supreme Court explained that class actions protect employees against retaliation and the fear  
6 of retaliation because they allow all but a few class members to pursue their rights without having to  
7 step forward and publicly challenge their employer. This was one of several reasons that the California  
8 Supreme Court held that California public policy prohibits certain class action waivers. The California  
9 Supreme Court cited a handful of federal court opinions to support this reasoning. For example, the  
10 Fifth Circuit has held that the possibility of retaliation against current employees is relevant to the  
11 numerosity inquiry—the question of practicability of joinder. *Mullen v. Treasure Chest Casino, LLC*,  
12 186 F.3d 620, 625 (5th Cir. 1999). In *Mullen*, it does not appear that plaintiffs presented evidence of  
13 actual retaliation, but rather that the district court “reasonably presumed that those potential class  
14 members still employed by [defendant] might be unwilling to sue individually or join a suit for fear of  
15 retaliation at their jobs.” *Id.*

16 Here, plaintiffs have alleged that there are between 150 and several hundred possible class  
17 members. Am. Compl. ¶ 18. In opposing plaintiffs’ first motion for class certification, defendants  
18 argued that plaintiffs failed to present any evidence supporting plaintiffs’ numerosity argument, but did  
19 not challenge numerosity otherwise. Doc. 36 at 29–30. It appears unlikely that the policy argument in  
20 favor of certification of a class containing current employees will come before the Court. Even if it  
21 does, the Court will not need documentation of actual retaliation, and the Court certainly will not need  
22 documentation beyond that currently in plaintiffs’ possession.

23 Because the request for production is not relevant to any claim that has actually been alleged in  
24 a complaint, is not relevant to a defense, and is not reasonably calculated to lead to the discovery of  
25 admissible evidence in the putative class action or multi-plaintiff case, *see* Fed. R. Civ. P. 26(b)(1), the  
26 Court DENIES plaintiffs’ motion to compel to the extent that plaintiffs request the production of

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28 operative complaint in the multi-plaintiff case.

retaliation documents.

## **II. Policy documents; Work documents of plaintiffs, declarants, and deponents**

In their initial letter to the Court, plaintiffs list two further categories of document requests: policy documents and work documents of plaintiffs, declarants, and deponents. In their reply letter, they appear to discuss these two categories together, and thus the Court does as well.

In its first set of requests for the production of documents in the putative class action, plaintiffs asked for “All policies, memos and documents related, directed, or applicable to any and all Field Representative (“FR”) Branch 3 licensees employed by Defendant at any time June 1, 2004–present.” Reply Ex. A at 2 (request 1). Plaintiffs argue that defendants produced only documents falling under the “directed . . . to” category. Plaintiffs list 14 subcategories of documents that they claim were not produced in response to its request:

- corporate memos, communications, and policies applicable to termite inspectors;
- termite inspectors’ schedules (including six subcategories);
- termite inspectors’ termite reports;
- documents relevant to termite inspectors’ inspections (including six subcategories);
- documents relevant to termite inspectors’ mandatory evening work;
- documents relevant to termite inspectors’ Saturday work;
- documents relevant to termite inspectors’ home work;
- documents relevant to termite inspectors’ meetings with managers;
- documents relevant to REI inspectors;
- documents relevant to termite inspectors trainees (including four subcategories);
- documents relevant to commissions (including two subcategories);
- documents relevant to termite inspectors’ salaries;
- documents relevant to reimbursement of termite inspectors (including four subcategories);
- documents relevant to changes in employee summaries or handbooks (including five subcategories).

It appears that plaintiff believes that they documents all fall under the single, quoted request for

document production. *See* Letter Br. Ex. 2 at 2–5. *But see* Reply Ex. A at 2–3 (making a separate request for, inter alia, “documents related . . . to work on any Saturday”).

Defendants argue that plaintiffs’ single request is overbroad, that it already produced some of the documents requested, that it has informed plaintiffs that there are no documents that fall in certain other categories, and that some requests were only made with regard to the two plaintiffs named in the putative class action (at least before subsequent production requests were served on September 29, 2010, the answers to which were not due until November 1, after briefing on this motion was completed). Defendants argue that any documents relating to employees other than termite inspectors are irrelevant to the question of class certification.

Although plaintiffs have not clearly identified each production request that supports their motion to compel, the Court has not seen any discovery requests that are limited to documents regarding the two named plaintiffs. *See generally* Reply Ex. A. Additionally, documents regarding positions other than termite inspector positions are relevant inasmuch as the different employees perform similar tasks; defendants have made certain decisions with regard to whether those employees are exempt or non-exempt that may be relevant to the question of whether the termite inspectors are exempt or non-exempt. To the extent that documents exist but have not yet been produced that fall under the categories listed above, plaintiffs’ motion is GRANTED. Defendant shall produce all relevant non-privileged documents within **twenty-one days of the date of this order**.

### III. Subpoenaed documents

Plaintiff have subpoenaed seven current employees of defendants to testify at depositions and to produce documents.<sup>4</sup> Plaintiffs state that the subpoenas specifically requested the production of work orders summaries, pay stubs, personnel records, and any documents recoding the deponents’ daily work, including but not limited to journals, logs, notes, and time records.<sup>5</sup> Plaintiffs assert that these requests

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<sup>4</sup> Defendants list these employees as T.J. Bergen, Vontalio Carter, Pablo Amado, Brian Brandner, Helios Costa, Dick Chhetri, and Noberto Contreras. *Opp.* at 5 n.4.

<sup>5</sup> No copy of any of these subpoenas is on record with the Court.

1 include requests for daily sales planners, daily schedules, daily sales records, commission pay-out  
2 summaries, contracts and packets for residential inspections, contracts and packets for commercial  
3 inspections, records of vehicle mileage, and records of reimbursement for expenses. The employees  
4 appeared at their depositions. But, plaintiffs argue, plaintiffs were not provided with the full scope of  
5 responsive documents in the deponents' possession.

6 Earlier in this litigation, defendants took the position that the employees are non-party  
7 deponents. Doc. 55.<sup>6</sup> The Court agreed with defendants, *see* Doc. 57, and on the instruction of the  
8 Court plaintiff subpoenaed the employees pursuant to Federal Rule of Civil Procedure 45. At the  
9 deposition, it appears, defendants took a different position. Defense counsel advised (to use the weakest  
10 possible language to describe what has been recorded on deposition transcripts) at least two witnesses  
11 regarding what documents they needed to produce at the deposition. *See* Reply Ex. H at 24:17–26:3  
12 (deponent Pablo Amado explaining that “Monique” told him that he “didn’t have to bring” certain  
13 documents); *id.* Ex. I at 95:18–97:18 (defense council: “I am advising the witness [T.J. Bergren] not  
14 to hand you over company files that happen to be in his possession”). It seems that defendants are also  
15 maintaining that position before the Court.<sup>7</sup>

16 In the case of a third-party witness, “[o]nly the witness may prevent disclosure by objection.  
17 The party to whom the subpoenaed records pertain *cannot* simply object. Rather, a protective order or  
18 motion to quash the subpoena is required.” Schwarzer et al., 2 Rutter Group Practice Guide: Federal  
19 Civil Procedure Before Trial (The Rutter Group 2010) 11-320, ¶ 11:2291 Note (emphasis in original).  
20 Moreover, a subpoena may request any document that appears to be within the non-party witness’s  
21 control. *Id.* at 11-311, ¶ 11:2245. Discovery rules do not differentiate between personal and “company”  
22 documents, as defense council did at one employee’s deposition. To the extent that defense council  
23 believed that some subpoenaed documents contained privileged or proprietary information, defendants  
24 should have filed a motion to quash, motion to modify, or motion for protective order within 14 days

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25 <sup>6</sup> Defendants took this position in a different discovery dispute that specifically concerned  
26 the depositions of five of these employees and one other former employee. *See* Doc. 55.

27 <sup>7</sup> Defendants also argue that they did not tell the witnesses not to bring documents to their  
28 depositions, and that they have reached out to three of the seven witnesses to ask them to perform a  
search for responsive documents.



of the service of the subpoena. *Id.* at 11-323, ¶ 11:2306.<sup>8</sup>

That said, this Court does not have the power to compel defendants to comply with a subpoena directed at third-party witnesses. *See id.* at 11-325 (11:2316) (explaining that non-party subpoenas are enforced by the filing of an application of an order to show cause why a contempt citation should not issue). Plaintiffs' motion to compel defendants to produce documents subpoenaed from non-party witnesses is DENIED.<sup>9</sup>

#### IV. Redaction of client names

Plaintiffs argue that defendants should not have redacted the names of customers from post-inspection reports that defendants provided in response to several requests for production. Plaintiffs argue that the names are not confidential, and in fact that the reports are filed with the state without the names of the customers being redacted. Plaintiffs explain that the customers are potential witnesses, and therefore that their names should be disclosed. Defendants argue that the names are private, proprietary information that defendants are obligated and entitled to protect. Defendants argue that plaintiffs originally took the position that the customer information was relevant to the question of mileage reimbursement, and that defendants have provided sufficient information about the location of customers to allow plaintiffs to estimate mileage reimbursements.

It does not appear that the customers could provide plaintiffs with information that cannot be obtained elsewhere, for example from plaintiffs and putative class members. Moreover, the Court is concerned about the burden on both defendants and on the customers if plaintiffs contact customers about this law suit. Plaintiffs' motion to compel production of the names of customers is DENIED.

#### V. Extension of time

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<sup>8</sup> Defendants' "advice" is particularly troubling to the Court since these deponents are defendants' current employees. *See* Reply Ex. I at 97:5–97:10 (Q: "So we're going to mark these documents . . . ." A: "Well, now I don't want to get in trouble for anything." Q: "You're not going to get in trouble." A: "I don't know.").

<sup>9</sup> To the extent that the unreceived subpoenaed documents are in the control of defendants and are covered by plaintiffs' discovery requests and the Court's decision in the previous section of this order, defendant is ORDERED to produce those documents.



Plaintiffs assert that the documents requested in their motion to compel are essential to their opposition to defendants' motion for partial summary judgment, which is due on December 23, and to their renewed motion for class certification, currently due December 10. Plaintiffs have requested additional time in order to incorporate any produced documents into their motion and opposition. This request is GRANTED. The hearing for defendants' motion for partial summary judgment, currently scheduled for January 14, is rescheduled for February 18, 2011. Plaintiffs' opposition brief is due 21 days before the hearing. Additionally, plaintiffs shall file any renewed motion for class certification on or before January 14, 2011.

### CONCLUSION

Plaintiffs' motion to compel is GRANTED IN PART and DENIED IN PART. (Doc. 73.) It is granted to the extent that documents exist but have not yet been produced that fall under the following categories:

- corporate memos, communications, and policies applicable to termite inspectors;
- termite inspectors' schedules (including six subcategories);
- termite inspectors' termite reports;
- documents relevant to termite inspectors' inspections (including six subcategories);
- documents relevant to termite inspectors' mandatory evening work;
- documents relevant to termite inspectors' Saturday work;
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- documents relevant to REI inspectors;
- documents relevant to termite inspectors trainees (including four subcategories);
- documents relevant to commissions (including two subcategories);
- documents relevant to termite inspectors' salaries;
- documents relevant to reimbursement of termite inspectors (including four subcategories);
- documents relevant to changes in employee summaries or handbooks (including five subcategories).


1 Defendants shall produce all relevant non-privileged documents within **by December 17, 2010.**

2 Plaintiffs' requests for the Court to compel production of other documents are denied.

3 Plaintiffs' deadlines for filing an opposition to defendants' motion for partial summary judgment  
4 and for filing a renewed motion for class certification are extended as discussed above.

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6 **IT IS SO ORDERED.**

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8 Dated: December 3, 2010

  
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SUSAN ILLSTON  
United States District Judge